

PROBATE SECTION MEETING
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Wrongful Death Actions and Probate Issues.

Opinions continue to be issued concerning procedural issues involving wrongful death claims and the appointment of a personal representative. More are reportedly on the way. Here are some of the latest:

1. Property Appointed Personal Representative Could not be Substituted as Plaintiff in Wrongful Death Action filed by Child of Decedent

The Supreme Court in *Ex parte Bio-Medical Applications of Alabama, Inc.*, No. 1150352 (Ala., July 15, 2016), held that when a wrongful death action was filed by a child of the decedent who had not been appointed as personal representative and the two-year statute of limitations expired, the complaint could not be amended to substitute the other child who had validly been appointed as personal representative. It did not matter that the child who filed the action was eligible for appointment as the personal representative – since he was not appointed he could not file an action. Accordingly, the complaint was dismissed.

2. Wrongful Death Action Filed After Personal Representative is Discharged and Released is a Nullity/No Relationship Back Upon Re-Appointment

In *Northstar Anesthesia of Alabama, LLC v. Noble*, No. 1141158 (Ala., July 8, 2016), the Supreme Court held that a wrongful death lawsuit filed after the personal representative had been discharged and released of responsibility pursuant to a final settlement of the estate was a nullity. The court also held that when the personal representative was supposedly “re-appointed” as personal representative after the two-year statute of limitations had run, this appointment would not relate back to the filing of the lawsuit. Thus, the lawsuit was due to be dismissed.

3. Letters Issued More than Two Years after Death Do Not Relate Back for Purposes of Wrongful Death Actions.

Continuing in the line of recent cases involving wrongful death claims, the Supreme Court in *Alvarado v. Estate of Madeline Kidd*, No. 1140706 (Ala., January 29, 2016), strove to

reconcile the apparently conflicting cases of *Ogle v. Gordon*, 706 So. 2d 707 (Ala. 1997), and *Wood v. Wayman*, 47 So. 3d 1212 (Ala. 2010), concerning the relation back rule for letters of administration or letters testamentary that are issued after the two-year statute of limitations applicable to wrongful death actions has passed. In effect, the Court concluded that the general default rule is that letters do not relate back because the wrongful death action is not an asset of, and does not benefit, the estate. See Ala. Code § 43-2-831. An exception is now recognized if the probate court takes an unduly long and unexplained time to issue the letters.

Personal Representative and Attorneys' Fees

In *Leonard v. Woodruff*, No. 2140822 (Ala. Civ. App., March 25, 2016), the Court of Civil Appeals held that a circuit court, sitting in equity over the administration of a decedent's estate that had been removed from probate court, had discretion to award the executrix attorneys' fees to be deducted from the distributive share of one beneficiary when that beneficiary had filed a separate lawsuit in New York against the executrix over estate matters and the New York court concluded that this action was barred by res judicata in the estate proceedings.

Trustees and Attorneys' Fees/Statutes of Limitation.

In a case of first impression, the Supreme Court in *Ladd v. Stockham*, No. 1140365 (Ala., March 25, 2016), held that the estate of a deceased trustee that successfully defended against a breach of fiduciary duty claim asserted by a trust beneficiary after the trustee resigned as such was still entitled to attorneys' fees under Ala. Code §19-3B-708 notwithstanding that the defendant was no longer the trustee at the time the lawsuit was filed. The Court also held that the two-year statute of limitations under Ala. Code §19-3B-1005 was the proper statute to be applied to a breach of duty claim against a trustee (or former trustee) in lieu of Ala. Code §6-2-38. This statute provides, similar to prior Alabama law, that a breach of fiduciary duty claim against a trustee is barred two years after the fiduciary relationship ceases. Finally, the Court noted that fraudulent concealment of a breach of fiduciary duty claim could toll the two-year statute pursuant to Ala. Code §6-2-3, but held that the evidence failed to substantiate such a tolling in this case.

Mortgage Holder Must File Claim Against Estate

In another case of first impression, the Supreme Court in *Schlumpf v. D'Olive*, No. 1141365 (Ala., March 25, 2016), held that a probate court could not order the sale of an intestate decedent's property in order to pay the debt of the mortgage on the property when the mortgagee did not file a timely claim against the estate. The Court's reasoning was that the mortgage debt was no longer a debt of the estate, and title to the property had passed automatically to the heirs. The Court did not address a situation involving a will in which the executor was given the power of sale over the decedent's real property.

Probate Judge Disqualified from Appealing Mandamus Ruling

In yet another case of first impression, the Court of Civil Appeals in *Enslen v. Alabama Department of Transportation*, No. 2140963 (Ala. Civ. App., March 18, 2016), held that a probate judge lacked standing to appeal from a mandamus order issued by a circuit court in a condemnation proceeding when the probate judge had not actively participated in the mandamus proceeding. The Court concluded that the judge was a nominal party and was not prejudiced or aggrieved by the judgment. The judge apparently argued that the mandamus order directed him to perform a legally erroneous act under the condemnation statutes, but the appellate court held that this was distinguishable from a legally impermissible act.

Statute of Limitations for Probating Will/Ore Tenus Rule

In *Hardy v. Hardin*, No. 1130612 (Ala., Jan. 22, 2016), the Supreme Court upheld the application of the five-year statute of limitations for probating a will under Ala. Code § 43-8-161. There was no question that the will had been submitted for probate after the five-year limitations period ran, and one or more of the interested parties asserted the limitations period as a defense and, thus, did not waive it. The proponent claimed that the limitations period was inapplicable as a result of fraud and cited Ala. Code § 43-8-5. While the circuit court on appeal concluded that the fraud exception ought to apply, the Supreme Court reversed in light of the *ore tenus* rule because the underlying probate judge had held that the evidence did not support the fraud exception and the circuit court was bound by that determination.

Common-Law Marriage Abolished – But Only Prospectively

Pursuant to Act No. 2016-306, common-law marriages in Alabama were abolished prospectively only as of January 1, 2017. This means that no new common-law marriages can be contracted beginning in 2017, but all common-law marriages validly contracted prior to that time will remain valid.

Statutory Laws Involving Impaired Individuals

1. Pursuant to Ala. Code § 38-9-7, it is a crime to physically, emotionally, or financially abuse an impaired person. Whether such a crime is a felony or misdemeanor depends on the details and the level of intent.

2. Under Act No. 2016-141, financial agents and broker-dealers are required to report situations in which they reasonably believe that financial exploitation of a vulnerable adult has or may be occurring. The financial institution is authorized to delay implementing a request for transaction until the issue has been investigated. The Alabama Securities Commission was given regulatory authority to promulgate rules to more particularly implement the terms of this statute.